Supreme Court, U.S.
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No. 96 - 1015

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

WALTER J. ROBOKOFF, KATHLEEN BATES, STEVEN NATIELLO and MICHELE STERLACE-ACCORSI,

Petitioners,

v.

WOMEN'S CHOICE OF BERGEN COUNTY, P.A., A Professional Service Corporation of New Jersey,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

REPLY BRIEF OF PETITIONERS

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ARGUMENT

I. This Court's Grant Of Certiorari in *Schenck v. Pro-Choice Network*, No. 95-1065 Indicates That, Contrary To The Assertions Of The Respondent, There Is A Continuing Need For This Court To Monitor The Misinterpretation And Misapplication of Its Decision In *Madsen v. Women's Health Center*, 512 U.S. 753, 114 S. Ct. 2516, 129 L.Ed.2d 593 (1994).

This court recently granted certiorari in the case of *Schenck v. Pro-Choice Network Of Western New York*, No. 95-1065, a case very similar to the present matter. 116 S.Ct. 1260, 134 L.Ed.2d 209 (1996). The Second Circuit in *Schenck* upheld an injunction prohibiting peaceful, non-threatening speech on public sidewalk outside an abortion facility in the absence of a showing that access to the facility was obstructed. 67 F.3d 359 (2d Cir. 1994), *modified* 67 F.3d 377 (2d Cir. 1995) (in banc). The Second Circuit held that expressive activity must yield to injunctive restraint even if "no one is physically injured, traffic moves, and private property is not invaded," *id at 397*. This Court found the decision in *Schenck* sufficiently disturbing to grant certiorari.

The present matter is even more compelling than the decision in *Schenck*. The original Chancery Division opinion, found in our Appendix at A-10, states at p. A-30 that:

> The named defendants will be bound by the injunction in the same manner as others having notice of the restraints. *They were not shown to have engaged in the unlawful 1989 acts nor to have violated the preliminary restraints*. (Emphasis supplied)

Ours is a case in which the named defendants were

specifically found by the Court to have done nothing wrong. Yet, they are to be bound by the injunction in the same manner as "others having notice of the restraints." In our case, the "offense" arises merely from knowing the terms of the injunction, and the penalty is a deprivation of one's right to converse on a public sidewalk.

Moreover, as set forth in our Petition, there has never been a finding that any individual committed any unlawful act at the premises. The allegations of the Respondent's Brief, aside from being relatively innocuous, have never been attributed to any particular individual. The Respondents in this case, like those in *Schenck*, have essentially been given a "free ride", and not required to show that "the defendant has violated, or imminently will violate, some provision of statutory or common law, and that there is a 'cognizable danger of recurrent violation.'" *Madsen, supra.* Certainly the Respondent should be required to make a more specific showing of illegal activity in order to deprive the Petitioners of their right to engage in First Amendment activity on a public sidewalk. An injunction against lawful picketing by individuals who have conducted their picketing in a lawful manner in the past is an unconstitutional prior restraint. *See Lawson v. Murray,* 115 S. Ct. 2264, 2265, 132 L.Ed.2d 269, 270 (1995) (Scalia, J., concurring); *Hirsh v. City of Atlanta*, 495 U.S. 927 (1990) (Stevens, J., concurring).

In *Madsen*, this Court confronted a "36-foot buffer zone around the clinic entrances and driveway," 114 S. Ct. at 2530. This Court upheld the zone in part and struck it down in part. *Id.* Insofar as this Court upheld the 36-foot zone, its ruling reflected the highly unusual factual circumstances at the abortion facility in Melbourn Florida.

The *Madsen* defendants had "repeatedly" interfered with the physical access of patients and staff, *id.* at 2526. A previous, narrower injunction had failed to protect that access, *id.* at 2527-28. This Court went on to say that "absent evidence that [defendants] . . . have obstructed access to the clinic, blocked vehicular traffic, or otherwise unlawfully interfered with the clinic's operation, [a] buffer zone fails to serve the significant government interests" at stake. *Id.* at 2528.

Like the New Jersey courts in the present case, the Second Circuit in *Schenck* rejected two crucial factors in the *Madsen* analysis: first, the need for initial resort to a narrower, nonspeech-restrictive injunction before imposing broader restrictions; and second, the need for a showing of pervasive lawbreaking to which the broader injunction provides a remedial measure. These factors are *not* mere incidental features of *Madsen;* rather, they represent essential constitutional predicates.

The Chancery Division in the present case went even further than the Second Circuit in *Schenck*, by specifically finding that the named defendants had done nothing wrong. Instead, the Chancery Division makes the Petitioners guilty by association *with persons who have never been identified by the Respondent or the Court, and who are unknown to the Petitioners.* Such an egregious affront to the First Amendment cannot be allowed to continue. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Healy v. James*, 408 U.S. 169 (1972).

CONCLUSION

Both the Second Circuit and the Supreme Court of New Jersey have misapplied this Court's recent decision in *Madsen* in such a way as to deprive innocent persons of their First Amendment rights. The recent grant of Certiorari in *Schenck v. Pro-Choice Network* appears to be an implicit recognition of this. In order to redress this deprivation, and to avoid conflicting interpretations of *Madsen*, the Court should grant the instant Petition and reverse the judgment below. In the alternative, the court should grant the instant Petition, vacate the judgment below, and remand this case to the New Jersey courts for reconsideration in light of the ultimate decision in *Schenck v. Pro-Choice Network*.

Respectfully submitted,

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February 10, 1997